BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA K. ENOCH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,021,803
DILLARD'S	)	
Respondent	)	
AND	)	
	)	
FIDELITY & GUARANTY INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the December 27, 2005, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

Claimant alleges she injured her neck and right shoulder in a series of micro-traumas while working for respondent as a sales clerk. Claimant contends the period of accident for this repetitive trauma injury is from approximately October 1 through approximately November 17, 2004. In the December 27, 2005, Order, Judge Avery granted claimant's request for temporary total disability benefits and medical benefits.

Respondent and its insurance carrier contend Judge Avery erred. They argue (1) claimant's cervical problems are from a preexisting spinal stenosis and, therefore, there is no connection between claimant's work and the cervical surgery she underwent; (2) claimant sustained a single traumatic injury on October 1, 2004, and, therefore, the notice of accident she provided respondent on November 10, 2004, was not timely; and (3) if claimant sustained a repetitive trauma injury, the trauma continued after the insurance carrier's coverage ended in January 2005 and, therefore, the Judge erred by awarding preliminary hearing benefits without providing respondent notice and an opportunity to be

heard in its capacity as a self-insured employer.[1] Accordingly, respondent and its insurance carrier request the Board to deny claimant's request for compensation. In the alternative, they request the Board remand this claim to the Judge with instructions regarding how to proceed.

Conversely, claimant contends the December 27, 2005, Order should be affirmed. Claimant argues she has established her work aggravated a preexisting condition in her neck, causing it to become symptomatic. Claimant also argues that the notice she gave respondent on November 10, 2004, was timely as she experienced a repetitive trauma injury rather than a single traumatic incident on October 1, 2004. Finally, claimant contends the appropriate date of accident for this series of alleged repetitive micro-traumas is November 17, 2004, when claimant saw Dr. Lynn Curtis and was initially restricted from working and given work restrictions.

The issues before the Board on this appeal are:

1. Did claimant injure her neck and right shoulder in a series of repetitive micro-traumas while working for respondent from approximately October 1, 2004, through approximately November 17, 2004?

2. If so, did claimant give respondent timely notice of that accidental injury?

3. Did respondent and its insurance carrier prove that claimant's repetitive trauma injury continued after November 17, 2004, and, if so, does that absolve respondent and its insurance carrier from liability for claimant's preliminary hearing benefits in this claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the December 27, 2005, preliminary hearing Order should be affirmed.

Claimant alleges she sustained a repetitive trauma injury to her neck and right shoulder working for respondent as a sales clerk. Claimant testified that around the first part of October 2004 she began having symptoms in her neck and right shoulder while at

[1] It is not clear whether respondent is represented by counsel for any alleged accidents and injuries that may have occurred after January 2005. It may be that counsel for respondent has entered or intended to enter a special appearance for a period of time limited to Fidelity & Guaranty Insurance Company's period of coverage.

work. According to claimant, the commencement of her symptoms coincided with doing a lot of arm motion and working overhead to set up wall displays.

When her symptoms began, claimant noticed her neck and right shoulder would begin aching every afternoon. But when she was not at work, her symptoms would improve. Claimant's symptoms gradually worsened and in either late October or early November 2004 she began missing work.

November 8, 2004, notes from St. Francis Family Medicine Clinic indicate claimant reported aching in her right shoulder, which had existed for approximately a month and which increased with the use of her right hand. Two days later, November 10, 2004, claimant saw her family physician, Dr. Jennifer L. Clair. The notes from that visit indicate claimant reported her symptoms had progressed to the point that they had become constant. Dr. Clair diagnosed right arm tendinitis that was likely secondary to overuse from claimant's work. The doctor declined to treat claimant but advised her to report her injury to her employer.

Claimant reported the injury to respondent on November 10, 2004, when an accident report was prepared. Respondent then referred claimant to Dr. Lynn Curtis, who examined claimant the next day and who then restricted claimant from using her right arm. Dr. Curtis saw claimant again on November 15, 2004, and the doctor diagnosed cervicalgia and restricted her from lifting more than 10 pounds. And two days later, November 17, 2004, the doctor restricted claimant from working. The clinic notes indicate claimant told the doctor her symptoms began about October 1, 2004.

The medical records indicate claimant returned to Dr. Curtis on November 19, 2004, at which time the doctor released her to return to modified work on November 22. In addition, the doctor restricted claimant from lifting more than 10 pounds and further noted that claimant could wear her neck collar at work.

Claimant testified that she returned to work for respondent following November 22, 2004, and experienced increased symptoms as respondent allegedly required her to perform some work that exceeded her restrictions. Dr. Curtis' December 1, 2004, records indicate claimant reported she had been lifting above her lifting restriction. Nonetheless, claimant reported she was doing better with no complaints of pain in her hand or arm, improved neck pain and less tenderness in her upper trapezius. According to the medical notes introduced at the preliminary hearing, the doctor telephoned respondent's human resources office and was advised that respondent, under no circumstances, was asking claimant to violate her work restrictions.

On December 17, 2004, Dr. Curtis further restricted claimant's work activities by prohibiting all above shoulder activity. But claimant's symptoms did not resolve and on

January 19, 2005, Dr. Curtis injected claimant's shoulder, took claimant off work for two days and referred her to Dr. Kurt R. Knappenberger for an orthopedic evaluation.

Dr. Knappenberger first examined claimant in late January 2005. According to the MRI studies requested by Dr. Knappenberger, claimant's right shoulder was normal but her cervical spine had significant degenerative changes and marked stenosis at the fourth and fifth (C4-5) and at the fifth and sixth (C5-6) cervical vertebrae. The doctor's office notes indicate respondent's workers compensation insurance carrier inquired whether claimant's neck problems were due to a preexisting condition or whether they were from a work-related injury. The office notes indicate the doctor believed claimant had possibly aggravated a preexisting problem.[2]

Dr. Knappenberger promptly referred claimant to Dr. John D. Ebeling for a neurosurgical evaluation. Dr. Ebeling saw claimant on February 17, 2005, and diagnosed cervical spine stenosis due to osteophytic disc protrusions with tight spinal cord compression. The doctor concluded claimant needed "a C5-C6 vertebrectomy, allograft, Strut graft and plating."[3] And in the doctor's March 9, 2005, office notes, the doctor indicated claimant also needed a C6-7 discectomy and fusion. Moreover, the doctor indicated that he had told claimant that the cervical decompression and fusion were not work-related. The Board finds, however, that Dr. Ebeling's records do not specifically address whether he believes claimant's work activities aggravated her underlying neck condition.

The record is not entirely clear but it appears Dr. Ebeling permitted claimant to return to work with a 30-pound weight restriction before she underwent her March 14, 2005, neck surgery.

At the insurance carrier's request, claimant was evaluated by neurological surgeon Dr. Wesley E. Griffitt. The doctor prepared an April 19, 2005, report in which he concluded claimant's neck problems did not appear to be "primarily"[4] related to work as the structural changes in claimant's neck were due to chronic degenerative changes. But Dr. Griffitt's report does not address whether claimant's work activity aggravated, accelerated or intensified claimant's preexisting condition.

And, finally, Dr. Edward J. Prostic examined claimant in late September 2005 at her attorney's request. In his September 28, 2005, report, Dr. Prostic indicated claimant's

---

[2] P.H. Trans., Cl. Ex. 3.

[3] *Id.*, Cl. Ex. 4.

[4] *Id.*, Resp. Ex. A at 3.

cervical spinal stenosis was "apparently aggravated by her overhead activity and lifting, pushing, and pulling."[5] In addition, the doctor concluded claimant had developed tendinitis in her right rotator cuff following her neck surgery.

At this juncture, the Board affirms the Judge's finding that claimant aggravated her neck while working as a sales clerk for respondent. Claimant's medical records support her testimony that her symptoms began in early October 2004 after performing repetitive activities at work.

The record is unclear how many days claimant worked after December 17, 2004, which is the approximate date the doctor added restrictions against activity above the shoulder level. But at that point in time claimant was receiving a course of medical treatment that eventually resulted in her March 2005 neck surgery.

Moreover, claimant's work activities had substantially changed shortly before December 17, 2004. And respondent's human resources office confirmed to Dr. Curtis that it was observing and accommodating claimant's medical restrictions. For purposes of preliminary hearing, the Board finds December 16, 2004, is the appropriate date of accident for this claimed series of repetitive micro-traumas as that appears to be the last day claimant worked before Dr. Curtis further restricted claimant's activities.[6] Consequently, claimant's notice of accidental injury to respondent on November 10, 2004, was timely.

Respondent and its insurance carrier's argument that claimant sustained a single traumatic injury on October 1, 2004, is not persuasive. Likewise, respondent and its insurance carrier's argument is without merit that they should not be responsible for claimant's injuries as respondent allegedly was neither given notice nor an opportunity to appear and defend itself as a self-insured employer. Moreover, in claims involving repetitive mini-traumas, the Board does not have jurisdiction from a preliminary hearing decision to apportion liability amongst insurance carriers when the claim is otherwise compensable against the employer and the dispute is over the date of accident for merely determining which insurance carrier is liable.

In summary, claimant has established she sustained personal injury by accident arising out of and in the course of employment with respondent and that she provided respondent with timely notice of that accidental injury.

---

[5] *Id.*, Cl. Ex. 6 at 3.

[6] See *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.[7]

WHEREFORE, the Board affirms the December 27, 2005, Order for Compensation entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of March, 2006.

BOARD MEMBER

c: Jeffrey E. King, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[7] K.S.A. 44-534a(a)(2).